ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Second Application of BellSouth Corporation,	)	CC Docket No. 98-121
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in Louisiana	)	

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION'S OPPOSITION TO BELLSOUTH'S PETITION FOR RECONSIDERATION AND CLARIFICATION

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SUMMARY

Eight months ago, the Commission denied BellSouth's first application to provide in-region services in Louisiana. Two months ago, the Commission again denied BellSouth's request for authority in Louisiana, finding that BellSouth still failed to satisfy Track A and 8 of the 14 checklist items. Throughout this process, and processes in several other states, the Commission has articulated the standard for Section 271 approval. Based on this standard and the evidence in this proceeding, the Commission properly concluded that BellSouth has not yet opened its market as required under the Act. BellSouth's Petition for Reconsideration and Clarification is a last-ditch effort to break down the standard for itself and other BOCs by reviving rejected arguments and misinterpreting the Commission's Order.

CompTel opposes BellSouth's Petition because, contrary to BellSouth's contention, the Commission correctly concluded that BellSouth limits CLECs to collocation. The evidence confirms that BellSouth offers no method of accessing and combining UNEs other than collocation. The offering of collocation alone is not sufficient to comply with the Act and the Eighth Circuit. To meet its UNE unbundling requirements, BellSouth and the other BOCs must provide, *in addition* to collocation, electronic separation and combination of UNEs such as through the "recent change" process currently available to the BOCs and, in fact, ordered by some of the states. In addition, the Commission was correct to conclude that the evidence shows that PCS is not yet an actual commercial alternative to traditional wireline services for the general population of Louisiana. BellSouth's flawed studies should not alter the Commission's test for the satisfaction of Track A of Section 271.

Although CompTel opposes BellSouth's Petition, one specific issue requires clarification: As Sprint requested, the Commission should clarify its procedures for "satisfied" checklist items. Any "certification" offered by BellSouth or another BOC in the future in reliance on previous findings of compliance must be specific. The BOC bears the burden of proving compliance with the checklist at the time of the second filing, including compliance based on changes in the law since the rejection of the first application.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully opposes BellSouth's Petition for Reconsideration and Clarification of the Commission's order denying, for a second time, BellSouth's application to provide in-region interLATA services in Louisiana.[1] In its Petition, BellSouth either rehashes previously rejected arguments or misconstrues the Commission's *Order*.[2] Thus, CompTel urges the Commission to reject BellSouth's Petition.[3] Instead, the Commission should grant Sprint's request for clarification with respect to the issues articulated below.

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1 *Application of BellSouth Corp., BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, FCC 98-271 (rel. Oct. 13, 1998) ("*Order*").

2 *In the Matter of Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, BellSouth's Petition for Reconsideration and Clarification, CC Docket No. 98-121 (filed Nov. 12, 1998)("Petition").

3 CompTel has limited this Opposition to the issues it considers to be of greatest importance. CompTel's failure to address each issue in BellSouth's Petition does not imply support for BellSouth's position on issues not discussed herein.

I. THE COMMISSION CORRECTLY DETERMINED THAT BELLSOUTH IS NOT PROVIDING COLLOCATION IN COMPLIANCE WITH THE CHECKLIST

In its Petition, BellSouth claims that the Commission made a factual error in analyzing BellSouth's collocation practices. Specifically, it claims the Commission incorrectly concluded that BellSouth permits combinations of elements only through collocation, because it also allegedly committed to negotiate other arrangements through a Bona Fide Request ("BFR") process. However, BellSouth's BFR commitment is patently insufficient, and the Commission correctly concluded that the only method of accessing and combining network elements that BellSouth offered as a legal and practical matter is collocation. Incumbent local exchange carriers ("ILECs") "can not limit a competitive carrier's choice to collocation as the only method for gaining access to and recombining network elements."[4] Thus, the Commission should reaffirm its conclusion, and should order BellSouth to provide electronic separation and combination of elements through the "recent change" functionality of BellSouth's switches.

BellSouth's BFR commitment is wholly insufficient to satisfy Section 251(c)(3) and its associated checklist requirements. The Commission has made clear that a Bell Operating Company ("BOC") cannot "provide" a checklist item by reference to a BFR process. In the *Ameritech Michigan Order*, the Commission stated:

> [W]e conclude that a BOC "provides" a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if the BOC makes the checklist item available as both a legal and a practical matter. Like the Department of Justice, we emphasize that *the mere fact that a BOC has "offered" to provide checklist items will not suffice for a BOC petitioning for entry* . . . .[5]

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4 *Order* at ¶ 164.

5 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,*

(continued...)

BellSouth's offer to negotiate through the BFR process does not make alternative arrangements available as either a legal or a practical matter. Therefore, the Commission must reject BellSouth's attempt to rely on the BFR process to meet its obligations under the Telecommunications Act of 1996 ("Act"). Indeed, BellSouth undertakes *no* "concrete and specific legal obligation" to furnish any type of arrangement whatsoever.[6] The fact remains that BellSouth has not only previously rejected various proposals for other methods of collocation,[7] but also there is no indication that it will reverse its stance on the requirements of the Act by considering alternatives to collocation. Given that BellSouth reiterates its claim (rejected by the *Order*) that "collocation is the only method of access contemplated by the 1996 Act,"[8] its promise to negotiate is truly pointless.

The Commission should take the opportunity of this reconsideration to reiterate, in clear and forceful terms, that BellSouth and other ILECs are obligated to make available other feasible methods of combining network elements. In particular, as CompTel explained in its comments on the BellSouth application, ILECs must offer, in addition to physical collocation, an electronic means of separating and combining network elements through the "recent change" functionality of the ILECs' switches.

(...continued)
Memorandum Opinion and Order, 12 FCC Rcd 20543, 20601 (1997)("*Ameritech Michigan Order*")(emphasis added).

6 *Id.*

7 *See Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 98-121, Varner Aff. at ¶¶ 76-79 (filed July 9, 1998).

8 BellSouth Petition at 9.

"Recent change" refers to a functionality resident in ILEC switches which is used to electronically activate and disconnect network elements, including the loop and port elements. The BOCs use recent change in their own operations to de-activate loops when, for example, a customer moves from an existing location. Recent change is then used to re-activate the same loops when a new customer orders service at that location, all without any physical disconnection of the loop and port. In addition, the BOCs provide access to the recent change functionality for certain Centrex customers, who are able to add, delete or move lines or features without any physical disconnection of service.

Access to this functionality can significantly speed the availability of competitive alternatives under the Act. As CompTel explained in its White Paper entitled "Broadening the Base: Combining Network Elements to Achieve Widespread Local Competition," the recent change approach is efficient, non-discriminatory, and pro-competitive. It avoids the excessive cost, long delays, and unnecessary disruption in service associated with manual separation and combination of elements. Moreover, an electronic means like recent change can be scaled to support the commercial volumes expected in a successful competitive environment. Indeed, the recent change functionality for local service changes is analogous to the PIC change process used today to change interexchange carriers, and, if implemented, can help ensure parity between these types of changes.

The ability of new entrants to use unbundled network elements ("UNEs"), as well as combinations of UNEs, is integral to widespread local competition. By fully automating the process of combining the loop and local switching network elements, the "recent change" process reduces barriers to serving a broad base of customers. If the Commission requires "recent change" as an alternative to collocation, potential competitive carriers would have

another means of entering the local market available to them, thereby ultimately benefiting consumers with a larger array of service options.

Availability of "recent change" is mandated by Section 251(c)(3)'s requirement of nondiscriminatory access to UNEs. As the Commission found in the *Order*, an ILEC "can not limit a competitive carrier's choice to collocation as the only method for gaining access to and recombining network elements."[9] Section 251(c)(3) does not limit competing carriers to collocation, but rather imposes "different and distinct" duties on ILECs to make access to network elements available.[10] Because BellSouth uses "recent change" to electronically separate and combine loops and ports, and because BellSouth offers access to "recent change" to its Centrex customers, it is obligated under Section 251(c)(3) to make this method available to new entrants. The Commission should order BellSouth to provide access to the "recent change" functionality of its switches.

Further, an electronic means such as "recent change" satisfies the Department of Justice's ("DOJ") concern that collocation-based access inhibits competition. In its Evaluation of BellSouth's second application, the DOJ concluded that a BOC's insistence upon collocation-based access methods "will inevitably slow the process of competitive entry, raise the cost of entry, and impair the quality of services by carriers seeking to combine UNEs."[11] In fact, the DOJ noted that BellSouth has failed to fully and irreversibly open the Louisiana market precisely because it has not complied with its interconnection obligations to competitors using UNEs.[12] By ordering ILECs to provide access to the "recent change" functionality, the Commission can

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9 *Order* at ¶ 164.

10 *Id.* at ¶ 168.

11 *See* Evaluation of the United States Department of Justice, CC Docket No. 98-121, filed August 19, 1998.

increase the ability of competitors to provide broad-based local competition.

Finally, access to the "recent change" functionality not only is more efficient and less disruptive, but also satisfies the ILECs' duties under the Eighth Circuit's *Iowa Utilities Board* decision.[13] In its Petition, BellSouth indicates its willingness to comply with the "Eighth Circuit's holdings and other applicable legal rules."[14] If this indication is genuine, then BellSouth must offer electronic access to UNEs. The Eighth Circuit's decision in *Iowa Utilities Board* upheld the Commission's determination that new entrants must be able to provide telecommunications services without deploying their own facilities and using *only* UNEs obtained from the ILEC.[15] The only issue left open after *Iowa Utilities Board* is *how* a BOC will provide the access necessary to allow competitors to use UNEs in the required manner. Unlike the collocation-based method BellSouth requires, "recent change" allows competitors to provide service *solely* through the ILEC's UNEs without having to own or control any part of the ILEC's network.[16] BellSouth has not identified any other method of access to network elements that would satisfy this requirement.

At least two states so far have recognized the need for "recent change." The Kentucky Public Service Commission ("PSC") rejected the updated Statement of Generally Available Terms ("SGAT") submitted by BellSouth Telecommunications, Inc. in part because

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(...continued)

12 *Id.* at n.5.

13 *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *modified on reh'g*, No. 96-3321 (Oct. 14, 1997), *cert. granted*, 118 S. Ct. 879 (Jan. 26, 1998)("*Iowa Utilities Board*").

14 BellSouth Petition at 9.

15 *See Iowa Utilities Board*, 120 F.3d at 814.

16 *Id.*

the SGAT specifies that UNEs may be combined by collocation only.[17] The Kentucky PSC found that the collocation-only requirement not only violates the Act, but also "is both discriminatory and unwarranted."[18] By concluding that the collocation-only requirement is unlawful, the PSC essentially ordered the use of "recent change." More recently, the Staff of the Texas Public Utility Commission recommended that Southwestern Bell Telephone Company, in order to comply with the Eighth Circuit, must offer access to the "recent change" capability.[19] It is expected that the Staff's recommendation will be adopted in full by the Commission.

II. BELLSOUTH OFFERS NO NEW EVIDENCE THAT PCS IS AN ACTUAL COMMERCIAL ALTERNATIVE TO WIRELINE SERVICE

After examining BellSouth's evidence, the Commission concluded (correctly) that BellSouth had failed to demonstrate that PCS service in Louisiana satisfies the Track A requirement.[20] BellSouth's Petition offers nothing to alter this conclusion. In fact, although BellSouth accuses the Commission of improperly interpreting Track A, the *Order* merely applied Track A in the manner it had been interpreted previously. BellSouth's evidence simply did not rise to that standard.

In the *SBC Oklahoma Order*, the Commission concluded that a competing provider must be "an actual commercial alternative" in order to satisfy Track A.[21] The

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17 *See In the Matter of Investigation Regarding Compliance of the Statement of Generally Available Terms of BellSouth Telecommunications, Inc. with Section 251 and Section 252(d) of the Telecommunications Act of 1996,* Order, Case No. 98-348, Kentucky Public Service Commission (Aug. 21, 1998).

18 *Id.* at 7.

19 *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market,* Final Staff Status Report on Collaborative Process, Project No. 16251, Texas Public Utility Commission (Nov. 18, 1998).

20 *Order* at ¶ 25.

21 *Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in* (continued...)

Commission repeated this finding in the *Ameritech Michigan Order*, noting that a new entrant's commercial presence may be so insignificant that "the new entrant cannot be said to be an actual commercial alternative to the BOC."[22] The D.C. Circuit upheld this interpretation of the Act, noting in particular that, "Track A does not indicate just how much competition a provider must offer . . . before it is deemed a 'competing' provider."[23] The Court concluded that it "cannot quarrel" with the Commission's interpretation of "competing provider" to require an "actual competitive alternative to the BOC."[24]

The Commission first applied this standard to PCS service in BellSouth's initial application for authority in Louisiana. In rejecting that showing, the Commission found that, while PCS theoretically could become an "actual commercial alternative," it was not such an alternative at this time.[25] Rather, while hopeful that the market might change, the Commission found PCS to be "a complementary telecommunications service [not] a competitive equivalent to wireline service."[26]

Nothing in the evidence submitted by BellSouth showed that PCS had now become a competitive equivalent to BellSouth's wireline local exchange service. And in its Petition, BellSouth merely rehashed the same evidence the Commission considered and rejected. The Commission found that the M/A/R/C study, for example, was "fundamentally flawed"

(...continued)
Oklahoma, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8694-95 (1997)("*SBC Oklahoma Order*").

22 *Ameritech Michigan Order* at 20585.

23 *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998).

24 *Id.*

25 *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 6245, 6290 (1998).

26 *Id.*

because (1) the sample group was not randomly selected, (2) the study is not based on statistical analysis, and (3) the study disguises the complementary nature of the services.[27] Indeed, the specific comment about state-wide PCS users at which BellSouth directs its Petition was made in explaining why the extrapolation that BellSouth offered from the study was unreliable.[28] The Commission simply found that BellSouth failed to show any significant amount of PCS substitution in the general PCS population in Louisiana. That conclusion is fully consistent with the Act and the Commission's previous Section 271 orders.

Similarly, the Commission properly found that BellSouth's evidence failed to show that PCS was an actual alternative for any significant number of customers. To be an "actual commercial alternative" to the BOC, a provider must be an alternative for more than a *de minimis* number of customers. Recognition of this fact does not, of course, mean that a specific market share is required, but it does mean that the *alternative* must exist in some meaningful way. Here, a mere handful of customers in New Orleans does not signify that PCS is an actual alternative in Louisiana. The fact remains that PCS-based service in Louisiana is complementary to local wireline service, and not yet a substitute for such service in the general population of Louisiana.

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27 *Order* at ¶ 35.

28 *Id.* at ¶ 37.

III. THE COMMISSION SHOULD CLARIFY THAT BOCS HAVE THE BURDEN TO DEMONSTRATE COMPLIANCE WITH THE COMPETITIVE CHECKLIST AS OF THE FILING DATE

In its Petition for Reconsideration and Clarification of the Commission's *Order*, Sprint requests that the Commission clarify its procedures for "satisfied" checklist items.[29] In the *Order*, the Commission concluded that BellSouth had met its burden with respect to certain checklist items, and that BellSouth would be permitted to certify, in future Section 271 applications, that its performance at that future time is consistent with its previous showing.[30] CompTel supports Sprint's request that the Commission clarify or reconsider how this procedure will operate.

To begin with, there is no dispute that the BOC "retains at all times the ultimate burden of proof that its application satisfies section 271."[31] Thus, the Commission's determination that some checklist items are satisfied today cannot relieve the BOC of the burden of proof to show that it is in compliance on whatever future date it re-applies for Section 271 authority. The Commission should clarify, therefore, that, while a BOC may rely on the Commission's determination as evidence of past compliance, a BOC will remain obligated to demonstrate its compliance *as of the date of the application.*

First, Sprint asks that the Commission clarify that "any 'certification' offered by BellSouth (and in the future, presumably other BOCs) must be specific" as opposed to any

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29 *In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services to Louisiana*, Petition of Sprint Communications Company L.P. for Reconsideration and Clarification, CC Docket No. 98-121 at 2-5 (filed Nov. 12, 1998)("Sprint Petition").

30 *Order* at ¶ 58.

31 *Ameritech Michigan Order* at 20568.

generalized self-assessment of "consistent" behavior.[32] CompTel agrees. Compliance with the Section 271 checklist is ongoing and forward-looking. To prove compliance, and show that its practices have not caused it to fall out of compliance, the BOC should be required to supplement the record with specific evidence that both the Commission and commenters may examine to test a claim of compliance, such as, for example, performance reports or periodic audits. The longer the gap between filings, the more important it is for the BOC to file specific data supporting its continued compliance with the checklist.

Second, CompTel agrees that the Commission should require BOCs to prove checklist compliance in future Section 271 applications based upon changes in the law in the intervening period. Sprint uses the example of UNE pricing.[33] Depending upon the outcome of the Supreme Court review of UNE pricing in *Iowa Utilities Board,* the Commission, in reviewing future Section 271 applications, must revisit the BOCs' compliance and require that the BOCs demonstrate compliance with the law in effect on the future filing date. Similarly, if during the intervening period between applications, the Commission orders access to additional network elements or to additional collocation options, a BOC must demonstrate in its subsequent application that it has implemented these requirements. It manifestly cannot rely on a previous determination of compliance if such elements were not part of the past determination. Accordingly, the Commission should clarify that a past Commission finding of compliance is only relevant to the specific elements evaluated as of the time of the Commission's determination.

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32 Sprint Petition at 3.

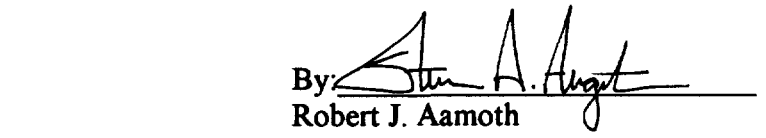
33 *See id.* at 4-5.

CONCLUSION

For the foregoing reasons, BellSouth's Petition for Reconsideration and Clarification should be denied. The Petition of Sprint should be granted to the extent described above.

Respectfully submitted,

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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December 15, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1998, a copy of **OPPOSITION TO BELLSOUTH'S PETITION FOR RECONSIDERATION AND CLARIFICATION** of the Competitive Telecommunications Association was sent via first-class mail, postage prepaid, to the following:

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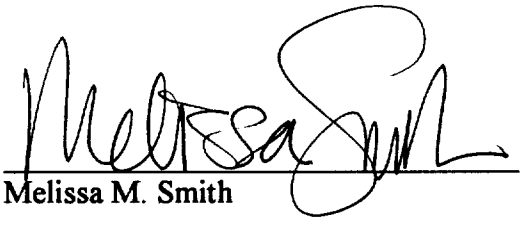

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